IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 15, 2006 Session

JPMORGAN CHASE BANK v. FRANKLIN NATIONAL BANK ET AL.

Appeal from the Chancery Court for Williamson County
No. 29966 Russ Heldman, Judge

No. M2005-02088-COA-R3-CV - Filed on August 13, 2007

This appeal stems from a dispute between two banks regarding the plaintiff bank's liability for discretionary costs after voluntarily dismissing the complaint it had filed against the defendant bank in the Chancery Court for Williamson County. Following the entry of the voluntary dismissal, the defendant bank, invoking Tenn. R. Civ. P. 41.04 and 54.04, requested the trial court to award its attorney's fees and court reporter expenses as discretionary costs. The trial court awarded the defendant bank $25,972.50 in discretionary costs, including $25,497.50 in attorney's fees and $475.00 in court reporter expenses. On this appeal, the plaintiff bank takes issue with the award of discretionary costs and requests that this court declare that the defendant bank violated Tenn. R. Civ. P. 11 by requesting these costs. We have determined that the trial court erred by awarding the defendant bank its attorney's fees as discretionary costs but did not abuse its discretion in awarding court reporter expenses. We also decline to consider whether the defendant bank's conduct violated Tenn. R. Civ. P. 11.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Frank H. Reeves, Nashville, Tennessee, for the appellant, JPMorgan Chase Bank as Trustee.

J. Timothy Street and E. Covington Johnston, Jr., Franklin, Tennessee, for the appellees, Franklin National Bank and J. Timothy Street, Successor Trustee.

OPINION

I.

Both JPMorgan Chase Bank ("Chase") and Franklin National Bank ("FNB"[1]) made loans to Michael E. Redick for his business, Fan-A-Mania Sports, Inc. Each bank secured its loan with the

---

[1] Chase also sued J. Timothy Street, a successor trustee. During the litigation, FNB was acquired by Fifth Third Bank. Since it is not apparent from the record that Fifth Third Bank was substituted as a party for FNB, we shall refer to all the defendants and their successors in interest as "FNB."

same piece of real property. After Mr. Redick defaulted on the loans, the banks disagreed over whose security interest had priority. Accordingly, in September 2003, Chase filed suit against FNB in the Chancery Court for Williamson County seeking a judicial resolution of their disagreement. This appeal does not involve the substantive merits of the banks' dispute.[2] Rather, it involves the aftermath of Chase's decision to voluntarily dismiss the complaint it filed in state court and to pursue the same relief in the United States District Court.

Both Chase and FNB filed unsuccessful motions for summary judgment in the trial court. On December 1, 2004, the trial court entered an agreed order setting the trial for March 8, 2005. Soon thereafter, the parties became ensnared in a discovery dispute. Chase propounded additional discovery requests and, in its transmittal letter, asked FNB to respond promptly because the answers to these discovery requests could require that additional depositions be taken. When Chase did not receive the responses by the discovery deadline, it sent FNB a follow up letter. FNB responded stating that the requested files were in Cincinnati, Ohio and that the pending merger with Fifth Third Bank was causing delay in retrieving the documents.

These discovery issues were the subject of discussion between the parties and the trial court at a January 3, 2005 hearing. During the hearing, FNB promised that it would deliver its responses within a couple of days. When the responses were not forthcoming, Chase sent a letter to FNB along with a draft motion to compel on January 11, 2005. The following day, FNB advised Chase that the documents were ready, and Chase picked them up.

Chase quickly determined that FNB had not been responsive to its discovery requests. It filed a motion to compel and also obtained the issuance of a subpoenas duces tecum directing the attendance of a FNB Tenn. R. Civ. P. 30.02(6) representative at a deposition to be conducted on January 27, 2005. FNB moved for a protective order on the same day the subpoena was served and requested an expedited hearing.[3]

With the trial date a little more than one month away, Chase became concerned about its ability to effectively address its pending motion to compel, FNB's motion for a protective order, a possible motion to show cause arising from FNB's failure to honor the subpoena, and to complete the discovery process before the March 8, 2005 trial date. Chase was unsure that the trial court would either resolve the discovery dispute or grant a continuance to enable it to complete discovery. Accordingly, Chase decided to avail itself of the "more tightly controlled pretrial process" in the United States District Court by voluntarily dismissing its complaint in state court and refiling the complaint in the United States District Court. On January 31, 2005, Chase filed a notice of voluntary dismissal, and the trial court entered an order acknowledging the voluntary dismissal on February

---

[2] We need not concern ourselves with the facts relating to the banks' priority dispute. The merits of that dispute have been litigated in the federal courts with a determination being reached in favor of Chase. *JPMorgan Chase Bank Nat'l Ass'n v. Fifth Third Bank, N.A.*, 222 F. App'x 444, 2007 WL 30786 (6th Cir. Jan. 4, 2007).

[3] FNB asserted that providing the requested documents would violate Tennessee's Financial Records Privacy Act and that FNB's lawyer had a schedule conflict with the time and date Chase had chosen for the deposition. FNB's lawyer offered several alternative dates approximately one week later than the January 27, 2005 date chosen by Chase.

14, 2005. Shortly thereafter, Chase filed suit against FNB in the United States District Court for the Middle District of Tennessee.

Soon after Chase filed its notice of voluntary dismissal, FNB filed a motion in the trial court seeking $26,381.34 in discretionary costs under Tenn. R. Civ. P. 54.04.[4] FNB later filed an amended motion invoking Tenn. R. Civ. P. 41.04 as an additional legal basis for its request for discretionary costs. In a memorandum opinion filed on July 18, 2005, the trial court awarded FNB $25,972.50 in discretionary costs which included all the requested costs except for the $8.84 postage expense and the $400.00 expert witness fees. On this appeal, Chase takes issue with the trial court's decision to award FNB $25,497.50 in attorney's fees and $475.00 in court reporter expenses as discretionary costs and also requests this court to determine that FNB violated Tenn. R. Civ. P. 11 by filing its amended petition for discretionary costs.

II.

The party seeking to recover its costs under Tenn. R. Civ. P. 54.04(2) has the burden of demonstrating that it is entitled to recover these costs. *Stalsworth v. Grummons*, 36 S.W.3d 832, 835 (Tenn. Ct. App. 2000). As a general matter, a party seeking discretionary costs must file a timely motion and should generally support this motion with an affidavit detailing the discretionary costs, verifying that they are accurate, that they have actually been charged, and that they are necessary and reasonable. *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 36 (Tenn. Ct. App. 2002). Once a party seeking costs under Tenn. R. Civ. P. 54.04(2) has filed its motion, the non-moving party may present evidence and argument challenging the requested costs. *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d at 36.

Parties are not entitled to costs under Tenn. R. Civ. P. 54.04(2) simply because they prevail at trial. *Sanders v. Gray*, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998). The particular equities of the case may influence a trial court's decision regarding these costs. *Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn. 1992); *Harpeth Utils. Dist. of Davidson and Williamson Counties v. Charron*, No. M2006-00035-COA-R3-CV, 2007 WL 1237687, at *4 (Tenn. Ct. App. Apr. 26, 2007) (No Tenn. R. App. P. 11 application filed); *Stalsworth v. Grummons*, 36 S.W.3d at 835. However, the courts should, as a general matter, award discretionary costs to a prevailing party if the costs are reasonable and necessary and if the prevailing party has filed a timely and properly supported motion. *Scholz v. S.B. Int'l, Inc.*, 40 S.W.3d 78, 84 (Tenn. Ct. App. 2000).

Awarding costs in accordance with Tenn. R. Civ. P. 54.04(2), like awarding other costs, is within the trial court's reasonable discretion. *Perdue v. Green Branch Mining Co.*, 837 S.W.2d at 60. Decisions regarding costs under Tenn. R. Civ. P. 41.04 are reviewed under the same standard applicable to Tenn. R. Civ. P. 54.04(2). We employ a deferential standard when reviewing a trial court's decision either to grant or to deny motions to assess these costs. *Scholz v. S.B. Int'l, Inc.*, 40 S.W.3d at 84. Because these decisions are discretionary, we are generally disinclined to second-guess a trial court's decision unless the trial court has abused its discretion. *Woodlawn Mem'l Park, Inc. v. Keith*, 70 S.W.3d 691, 698 (Tenn. 2002); *Stalsworth v. Grummons*, 36 S.W.3d

[4] These discretionary costs included $25,497.50 in attorney's fees, $475.00 in court reporter expenses, $400.00 in expert witness fees, and $8.84 in postage.

at 836; *Mitchell v. Smith*, 779 S.W.2d 384, 392 (Tenn. Ct. App. 1989). The party who takes issue on appeal with a trial court's decision regarding discretionary costs has the burden of demonstrating that the trial court abused its discretion. *Sanders v. Gray*, 989 S.W.2d at 345.

The "abuse of discretion" standard of review calls for less intense appellate review and, therefore, less likelihood that the trial court's decision will be reversed. *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Thus, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn.2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). Accordingly, a trial court has "abused its discretion" when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Woodlawn Mem'l Park, Inc. v. Keith*, 70 S.W.3d at 698; *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Francois v. Willis*, 205 S.W.3d 915, 916 (Tenn. Ct. App. 2006); *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005).

III.

We turn first to the award of $25,497.50 in attorney's fees. Chase insists that awards for attorney's fees are not permitted under either Tenn. R. Civ. P. 54.04(2) or Tenn. R. Civ. P. 41.04. While its reasoning is somewhat opaque, FNB asserts that the award of attorney's fees can be supported by either Tenn. R. Civ. P. 54.04(2), Tenn. R. Civ. P. 41.04, or general notions of fairness that permit trial courts to alleviate harm to a party resulting from a vexatious and oppressive nonsuit. Chase has the better argument.

A.

Tenn. R. Civ. P. 54.04(2) provides that "[t]he court may tax discretionary costs at the time of voluntary dismissal." Courts may award only those discretionary costs contemplated by the rule. *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d at 35-36; *see also Harpeth Valley Utils. Dist. of Davidson and Williamson Counties v. Charron*, 2007 WL 1237687, at *4; *Kendall v. Cook*, No. E2005-02763-COA-R3-CV, 2006 WL 3501325, at *1 (Tenn. Ct. App. Dec. 6, 2006) (No Tenn. R. App. P. 11 application filed); *Trundle v. Park*, 210 S.W.3d 575, 582 (Tenn. Ct. App. 2006). According to the plain language of Tenn. R. Civ. P. 54.04(2), the only recoverable discretionary costs are "reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs." Tenn. R. Civ. P. 54 does not permit trial courts to tax attorneys' fees as costs. *Lock v. Nat'l Union Fire Ins. Co.*, 809 S.W.2d 483, 490 n.5 (Tenn. 1991); *see also Duncan v. DeMoss*, 880 S.W.2d 388, 390 (Tenn. Ct. App. 1994). Therefore, Rule 54.04(2) could not have provided a legal basis for the trial court to have awarded attorneys fees in this case.

B.

Not daunted, FNB insists that Tenn. R. Civ. P. 41.04[5] authorizes the award for attorney's fees in circumstances like the one involved in this case. Undoubtedly, Tenn. R. Civ. P. 41.04 imposes potential consequences on parties who file a new action based upon the same claim against the same defendant following a voluntary dismissal. The consequences are that "the Court" is (1) empowered to order the payment of the costs of the previously dismissed action and (2) given the power to stay the proceeding pending compliance with its order. The question raised by this appeal is whether "the Court" empowered by Tenn. R. Civ. P. 41.04 is the court in which the action was dismissed or the court in which the subsequent action was commenced.

It is a long-standing principle of interpretation in Tennessee that "all intendments will be made and all doubts resolved in favor of that interpretation which will support the act, and avoid conflict with the constitution." *State v. Yardley*, 95 Tenn. 546, 560, 32 S.W. 481, 484 (1895.)[6] As more recently stated by the Tennessee Supreme Court, "where one reasonable interpretation would render a statute unconstitutional and another reasonable interpretation would render it valid, courts are to choose the construction which validates the statute." *Bailey v. County of Shelby*, 188 S.W.3d 539, 547 (Tenn. 2006).[7] When interpreting Tenn. R. Civ. P. 41.04 using this canon of construction, it becomes readily apparent that "the Court" referenced in Tenn. R. Civ. P. 41.04 can only be the court in which the subsequent action is commenced, not the court in which the action has been voluntarily dismissed.

Pursuant to a long-standing general rule reflecting this nation's dual court system, the United States Supreme Court has determined that a state court may neither enjoin proceedings before a federal court nor prevent a party from pursuing a federal court remedy. *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 236 n. 9, 118 S. Ct. 657, 665 n. 9 (1998); *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 15-18, 98 S. Ct. 76, 77-79 (1977); *Donovan v. City of Dallas*, 377 U.S. 408, 412-14, 84 S. Ct. 1579, 1582-83 (1964).[8] The Tennessee Supreme Court has also recognized this principle. *Roy v. Brittain*, 201 Tenn. 140, 145, 297 S.W.2d 72, 74 (1956). Deviation from this general

---

[5] Tenn. R. Civ. P. 41.04 provides that "[i]f a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the Court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the new action until the plaintiff has complied with the order."

[6] *See also Schoenlau-Steiner Trunk Top & Veneer Co. v. Hilderbrand*, 152 Tenn. 166, 179, 274 S.W. 544, 548 (1925); *Minter v. State*, 145 Tenn. 678, 682, 238 S.W. 89, 90 (1922); *Heiskell v. City of Knoxville*, 136 Tenn. 376, 383, 189 S.W. 857, 859 (1916).

[7] Tennessee is certainly not alone in employing this interpretive approach; quite to the contrary, this is a widely embraced canon of construction. *See e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392,1397-98 (1988); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 57 S.Ct. 615, 621 (1937); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804).

[8] *See also* Joan Steinman, *Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions?*, 36 Wake Forest L. Rev. 1043, 1090 n. 218 (2001); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke L.J. 1143, 1155 n. 39 (2005) ("[T]he Supreme Court has held . . . that state courts generally lack the power to enjoin federal court proceedings.").

principle has been permitted only under limited circumstances that are not applicable in the present case. Notably, state courts may enjoin proceedings in federal courts in *rem* or *quasi in rem* matters, *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 465-68, 59 S. Ct. 275, 280-281 (1939),[9] in order "to protect the jurisdiction of the state court over property in its custody or under its control." Charles Alan Wright, *Law of Federal Courts* 296 (5th ed. 1994).[10]

Tenn. R. Civ. P. 41.04 cannot and does not authorize Tennessee's courts to enjoin proceedings in a federal court which have been filed there following a voluntary dismissal in state court. Tennessee's courts simply do not have the power to do so. Accordingly, the only interpretation of Tenn. R. Civ. P. 41.04 that will avoid a fatal clash with the United States Constitution is to interpret "the Court" in Tenn. R. Civ. P. 41.04 to refer to the court in which the subsequent action is commenced, and it is to that court that a defendant must apply for relief after the case has been refiled.[11] Accordingly, if FNB desired relief following the refiling of Chase's claim in the United States District Court, it should have invoked Fed. R. Civ. P. 41(d)[12] in the subsequent federal proceeding.

The trial court lacked jurisdiction to award costs under Tenn. R. Civ. P. 41.04 because Chase did not commence its subsequent action in the Chancery Court for Williamson County but instead in the United States District Court for the Middle District of Tennessee. Accordingly, even if we were to assume arguendo that Tenn. R. Civ. P. 41.04 allowed trial courts to award attorney's fees following the voluntary dismissal of a case as part of the "costs of the action previously dismissed," we would still find the trial court erred by awarding attorney's fees in this case.

C.

FNB also contends that the trial court has discretion to award attorney's fees to a defendant after a plaintiff voluntarily dismisses its suit in order to alleviate harm to the defendant. Relying on *Panzer v. King*, 743 S.W. 2d 612 (1988), *abrogated on other grounds by Lacy v. Cox*, 152 S.W.3d

---

[9] *See also Donovan v. City of Dallas*, 377 U.S. at 412, 84 S. Ct. at 1582 ("An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*."); *Koken v. Viad Corp.*, 307 F. Supp. 2d 650, 655 (E.D. Pa. 2004).

[10] Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. Pa. L. Rev. 91, 124 n. 143 (1998).

[11] Tenn. R. Civ. P. 41.04 "clearly contemplates that the determination of when the plaintiff must pay costs previously ordered is made after the case is refiled." *Yeubanks v. Methodist Healthcare-Memphis Hosps.*, No. W2001-02051-COA-R3-CV, 2003 WL 21392411, at *12 (Tenn. Ct. App. June 10, 2003) *perm. app. denied* (Tenn. Dec. 8, 2003).

[12] Absent Congressional action, pursuant to 2007 US ORDER 30 (C.O. 30), stylistic modifications to Fed. R. Civ. P. 41(d) will take effect by order of the United States Supreme Court on December 1, 2007. The modified version of Fed. R. Civ. P. 41(d) is as follows:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
> (2) may stay the proceedings until the plaintiff has complied.

480 (Tenn. 2004), FNB insists that "[i]t is not the law in Tennessee that recovery of attorney's fees may only be awarded through statute or contract." Rather, FNB contends that attorney's fees can be awarded even absent a statute, rule, or contract. We find little merit in FNB's argument that a voluntary dismissal for oppressive or vexatious purposes somehow provides independent grounds for awarding attorney's fees.

As a general rule, Tennessee Courts adhere to the American Rule under which attorney's fees are not recoverable absent a statute or contract specifically providing for such recovery, *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005); *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000), or a recognized ground of equity, *Pullman Standard, Inc. v. Abex Corp.*, 693 S.W.2d 336, 338 (Tenn. 1985); *Larson v. Halliburton*, No. M2004-02435-COA-R3-CV, 2007 WL 1241343, at * 4 (Tenn. Ct. App. Apr. 27, 2007) (No Tenn. R. App. P. 11 application filed). Exceptions to this general prohibition have been carved out;[13] however, the only arguments presented by FNB relate to alleviating harm to a defendant resulting from a voluntary dismissal for vexatious or oppressive reasons.

With regard to its contention that alleviating harm from a voluntary dismissal is an adequate basis for awarding attorney's fees, FNB relies upon the following statement from *Panzer v. King*, 743 S.W. 2d at 616: "The trial court should impose only those conditions such as costs, attorneys fees, reasonable expenses of preparing for trial, etc., that are necessary to alleviate harm to defendant, and the court's discretion is reviewable only for abuse of discretion." There are multiple problems with FNB's reliance upon this assertion. We discuss the two most significant.

First, the *Panzer v. King* case involved a plaintiff who could no longer voluntarily dismiss his suit as a matter of right. *Panzer v. King*, 743 S.W. 2d at 615-16. The Tennessee Supreme Court indicated in *Panzer v. King* that trial courts could appropriately attach conditions to granting the nonsuit that would alleviate the harm to the defendant in circumstances where the plaintiff was no longer entitled, as of right, to a voluntary nonsuit. *Panzer v. King*, 743 S.W. 2d at 615-16. In this case, however, Chase's decision to voluntarily dismiss its complaint in state court was as of right and was, therefore, not subject to the trial court's discretion. Tenn. R. Civ. P. 41.01(1). Thus, *Panzer v. King* is inapplicable.

Second, the reference to attorney's fees in *Panzer v. King* is merely dictum that cannot carry the weight placed on it by FNB. In *Panzer v. King*, the court indicated that the issue before it involved "the question of the right of [a] plaintiff to take a voluntary non-suit after the entry of the trial court's order setting aside the jury verdict and granting plaintiff a new trial . . .." *Panzer v. King*, 743 S.W. 2d at 613. No attorney's fees had been awarded in the case nor was there any argument as to whether attorney's fees should have been awarded. The language of a decision must be read in the context of the issues and circumstances of the case. Expressions and commentary that exceed the bounds of the issues before the court and the circumstances of the case and asides that are unnecessary to the decision are dicta. *See e.g.*, *Rush v. Chattanooga Du Pont Employees' Credit Union*, 210 Tenn. 344, 350, 358 S.W.2d 333, 336 (1962) ("Every decision must be read with special reference to the questions involved and necessary to be decided, and language used not decisive of

[13] *See generally* 2 Lawrence A. Pivnick, *Tenn. Cir. Ct. Prac.* § 27:11, at 400-06 (2007).

the case or decided therein is not binding as a precedent."); *Staten v. State*, 191 Tenn. 157, 159-160, 232 S.W.2d 18, 19 (1950); *Andrew Johnson Bank v. Bryant, Price, Brandt, Jordan and Williams*, 744 S.W.2d 581, 584 (Tenn. Ct. App. 1988). The reference to attorney's fees in *Panzer v. King* is merely dictum.

As for FNB's reference to vexatious forum shopping and voluntarily dismissing for oppressive reasons as a basis for the award of attorney's fees, we conclude that trial court's decision to award attorney's fees cannot be affirmed on this basis either. FNB's argument on this point is not clearly developed. Tenn. R. Civ. P. 11.03 is the closest discernable basis for awarding attorney's fees in accordance with this argument. However, FNB did not file a motion for Tenn. R. Civ. P. 11 sanctions, nor did the state trial court follow the necessary procedures for initiating sanctions upon its own motion. Tenn. R. Civ. P. 11.03(1). Therefore, an award of attorney's fees as a sanction in this case cannot be upheld under Tenn. R. Civ. P. 11. *Fossett v. Gray*, 173 S.W.3d 742, 752-53 (Tenn. Ct. App. 2004). Nor can the attorney's fees provisions of Tenn. R. Civ. P. 26 and Tenn. R. Civ. P. 37 provide a basis for affirming the chancery court's attorney's fees award. These Rules relate to discovery disputes, not an involuntary dismissal, and are inapplicable in the present case. Simply stated, the chancery court did not have a proper legal basis to award attorney's fees and erred in doing so.

IV.

The trial court also awarded $475.00 for court reporter expenses pursuant to Tenn. R. Civ. P. 41.04 and Tenn. R. Civ. P. 54.04(2). Chase contends that awarding these court reporter expenses was error. As previously discussed, the trial court was without jurisdiction to award any costs pursuant to Rule 41.04. However, we conclude that the trial court did not abuse its discretion in awarding court reporter expenses pursuant to Tenn. R. Civ. P. 54.04(2).

Tenn. R. Civ. P. 54.04(2) expressly provides for awarding court reporter expenses as a discretionary cost. Awards of discretionary costs are intended to help make a party whole rather than to punish a party either for its conduct that caused the litigation or for its conduct during the litigation. *Scholz v. S.B. Int'l., Inc.*, 40 S.W.3d at 85.

The courts should, as a general matter, award discretionary costs to a prevailing party if the costs are reasonable and necessary and if the prevailing party has filed a timely and properly supported motion. *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d at 35. However, it does not necessarily follow that a party is entitled to discretionary costs simply because it prevailed. *Sanders v. Gray*, 989 S.W.2d at 345. There are circumstances where a prevailing party would not be entitled to these discretionary costs. *Scholz v. S.B. Int'l., Inc.*, 40 S.W.3d at 85. For example, "[l]itigants who adopt unreasonable litigation strategies or who unilaterally run up extravagant litigation expenses should not be permitted to pass these sorts of costs on to their adversaries." *Scholz v. S.B. Int'l., Inc.*, 40 S.W.3d at 85. When deciding whether to award discretionary costs under Tenn. R. Civ. P. 54.04(2), the courts should (1) determine whether the party requesting the costs is the "prevailing party," (2) limit awards to the costs specifically identified in the rule, (3) determine whether the requested costs are necessary and reasonable, and (4) determine whether the prevailing party has engaged in conduct during the litigation that warrants depriving it of the discretionary costs to which it might otherwise be entitled. *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d at 35-36.

For the purpose of Tenn. R. Civ. P. 54.02(2), FNB was the prevailing party because Chase voluntarily dismissed its suit. Court reporter expenses are specifically identified in Tenn. R. Civ. P. 54.02(2), and the trial court, at least implicitly, must have determined that the costs were necessary and reasonable. Thus, the sole question is whether the trial court abused its discretion by failing to find that the FNB engaged in conduct during the litigation that warrants depriving it of the discretionary costs to which it might otherwise be entitled.

Chase asserts that FNB engaged in tactics that were improperly designed to delay and obstruct and to consistently place Chase in a weak litigation position by having relied upon assurances from FNB that were not met. For its part, FNB insists that its conduct was entirely proper and that it was Chase that engaged in conduct that was vexatious and oppressive. FNB attributes any delays to difficulties caused by the location of the documents and the corporate merger of FNB with Fifth Third Bank. Having reviewed the parties' briefs and the record in this case, we conclude that the trial court did not abuse its discretion by determining that FNB did not engage in conduct that warranted depriving it of discretionary costs which are generally awarded to the prevailing party.

V.

Finally, Chase insists that "it would be very appropriate for [this court] to find that FNB's Amended Motion [for Discretionary Costs] violates the standards set forth in . . . [Tenn. R. Civ. P.] 11." Chase, however, did not seek Tenn. R. Civ. P. 11 sanctions in the trial court, and it now concedes that "this Court is not in a position to impose Rule 11 sanctions." This concession is well-taken.

At least two barriers stand in the way of Chase's belated efforts to seek Tenn. R. Civ. P. 11 sanctions. First, Chase did not follow the procedure outlined within Tenn. R. Civ. P. 11.03(1). Second, Chase is barred from seeking Tenn. R. Civ. P. 11 sanctions for the first time on appeal because it did not seek this relief in the trial court. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991)*; Bell v. Todd*, 206 S.W.3d 86, 93 (Tenn. Ct. App. 2005); *Williamson County Broad. Co. v. Intermedia Partners*, 987 S.W.2d 550, 553 (Tenn. Ct. App. 1998); *Sweeney v. State Dep't of Transp.*, 744 S.W.2d 905, 906 (Tenn. Ct. App. 1987).

VI.

Having determined that the trial court erred by awarding FNB attorney's fees, we vacate that portion of the July 27, 2005 order and remand the case to the trial court with directions to reduce the judgment against Chase from $25,972.50 to $475.00 and for whatever further proceedings consistent with this rule may be required. We tax the costs of this appeal in equal proportions to JPMorgan Chase Bank and its surety and to Franklin National Bank for which execution, if necessary, may issue.

_____

WILLIAM C. KOCH, JR., P.J., M.S.